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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 570

LORD MANUFACTURING COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Lord Manufacturing Company prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on July 11, 1949.

Opinion Below

The opinion of the Court of Claims (R. 88-101) is reported in 84 F. Supp. 748.

Jurisdiction

The judgment of the Court of Claims was entered on July 11, 1949 (R. 102). Petitioner's motion for a new trial, seasonably filed, was denied on October 3, 1949 (R. 102). By order of this Court on November 1, 1949, the time within

which to file a petition for certiorari was extended to and including February 16, 1950 (R. 217). The jurisdiction of this Court is invoked under the provisions of Section 1255 of the Judicial Code.

Questions Presented

The United States, by compulsory purchase and repricing orders, requisitioned petitioner's products. These products, which were patented, had been sold by petitioner in large quantities at prices fixed no later than 1939, except for some on which prices were later reduced. All prices were equal to or less than applicable OPA ceilings. In this suit to recover just compensation under the Fifth Amendment, the questions are:

1. Could the court below properly ignore the market price because under it petitioner's profits exceeded 10 percent?

2. Could the court below properly ignore the market price because it contained some element attributable to petitioner's patents on the ground that patents are "in the nature of a concession by the Government"?

3. Could the court below properly ignore the market price because the Government, by its power to allocate raw materials, might have prevented petitioner from producing the requisitioned products at all?

Statutes Involved

The actions of respondent which form the basis of this suit were taken under the authority of Section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892, as amended by 57 Stat. 164; 50 U. S. C. App. §309) and Title VIII of the Revenue Act of 1943 (58 Stat. 92; 50 U. S. C. App. §1192). The pertinent text of these statutes is reproduced in Appendices A and B hereto.

Statement

These are just compensation cases. Petitioner filed petitions and an amended petition in the Court of Claims (R. 1, 18) to recover the difference between what it asserts to be just compensation for certain of its products, and the amounts paid to it under the terms of two compulsory purchase orders and a repricing order issued by respondent.[1] The products in question were delivered to respondent under these orders. The lower court has held that the orders constituted takings of petitioner's property. With this holding, which is in full accord with the decision of this Court in *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 220, petitioner agrees. Petitioner seeks review here of that part of the judgment of the court below which determines the amount of just compensation awarded to petitioner.

Petitioner is a Pennsylvania corporation primarily engaged in the manufacture of products known generally as bonded rubber shear type mountings. These mountings, which are composed of rubber securely united or bonded to mental, prevent the transmission of vibration from one metal part to another. The principal use of the products here involved is the protection of delicate instruments employed in aircraft, and the suspension of aircraft engines (Findings 1, 2, 3, 4, R. 31-34). Petitioner and its predecessors have been in the business of developing and manufacturing these and similar products since 1919. H. C. Lord, president of petitioner, was a pioneer in the field of vibration absorption, and from 1919 on had issued to him many patents based on his developments (Findings 1, 2, R. 31-32). Substantially all of petitioner's property taken by respond-

[1] The two proceedings below were consolidated for trial. Each involves the same questions, and may be considered here as one proceeding, as the court below did in its opinion.

ent for which just compensation is now sought was covered by patents owned by petitioner and granted long prior to the war (Finding 5, R. 34).[2]

Through petitioner's pioneering work, and its success in developing efficient mountings, it occupied a dominant position in the vibration mounting field from about 1932 until about 1942. When manufacturers began producing military aircraft in large numbers in the period from 1940 to 1944, petitioner's mountings were greatly in demand, since petitioner's name was known to airplane manufacturers by reason of prior dealings, its products had proved highly satisfactory in commercial aircraft, and they had been approved under the Army specifications (Finding 6, R. 34-35).

Although the superiority of petitioner's products had largely eliminated competing devices by 1932,[3] beginning in 1941, and thereafter from 1942 through 1944, no fewer than nine competitors manufactured and sold products similar to those of petitioner. While these competitive products met Army and Navy specifications, and generally gave satisfactory results, purchasers were often reluctant to take them rather than those made by petitioner, which were of a known high character and had been proved to be efficient by years of use. None of petitioner's competitors

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[2] Petitioner pleaded that its products were covered by its patents (No. 46573, Par. 21(d), R. 10; No. 47328, Par. 6, R. 19). Three of the major patents issued in 1930, 1932 and 1935 were admitted in evidence with testimony that they covered practically all of the products requisitioned by the respondent and the court so found (Finding 5, R. 34). The court below refused to make a finding on validity, considering it irrelevant (Finding 46, R. 82). Petitioner has assigned error to the refusal of the court below to find the patents valid. For purposes of the present proceeding, the patents must be assumed to be valid, for respondent put forward no evidence on patents and refused even to cross-examine petitioner's patent expert (R. 124).

[3] See Finding 4, R. 33. However, until at least 1938, Navy aircraft used a competitive product—the Lancaster mount—which cost about ten times as much as petitioner's product (*ibid.*).

had a comparable background of engineering experience and research. Petitioner also furnished to purchasers of its mountings engineering services which as a rule were not furnished by its competitors (Finding 9, R. 37-38).

None of petitioner's competitors manufactured a full line of mountings, but a substitute for or imitation of substantially all products made by petitioner and involved in this suit was made by at least one competitor.[4] Some of petitioner's competitors received the aid of Government financing and some, perhaps all, received from prime contractors blueprints and engineering assistance in the manufacture of their products (*cf.* Findings 46 and 47, R. 82-85). Petitioner received no financial assistance from respondent or any prime contractors and, since it had developed the products in question and owned the patents thereon, it did not receive blueprints or other engineering assistance from prime contractors.

Petitioner had established prices for most of its products here involved in 1933 (Exhs. 45-50, unpaginated Record volume), and, except for one general 15 percent increase on November 10, 1939, did not raise its price level at any time prior to the effective date of the takings herein (Finding 10, R. 38). In all cases, its prices were established before the United States entered the war (Finding 10, R. 38). These prices were not based on any fixed formula or percentage of profit but were based on the comparative advantage of petitioner's products (Finding 10, R. 38-39). During the war period, up to the time of the taking, the only change in peti-

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[4] See Findings 9, 46, 47, R. 37-38, 82-85. *Cf.* the articles included in the Army compulsory order (R. 181-183) and in the Navy compulsory order (Finding 19, R. 47-49), with the testimony (R. 106-107, 107-108, 109, 112, 118-119, 119, 121-122, 122-124, 124-125, 137, 138, 150, 162-163, 165, 166-167, 167-168, 172, 176). Petitioner is assigning error to the refusal of the court below to find that there was at least one competitor for substantially all of petitioner's products here involved. See petitioner's exception to Finding 9, R. 192.

tioner's prices was in June and July 1942 when petitioner *reduced* its prices on three of its most important products (dynafocal engine mounts) by an aggregate of more than 9 percent (Tabulation in Finding 45, R. 82). In addition, prices on certain dynafocal parts were reduced in August 1944 (Def. Exh. 44, R. 183-184). Petitioner seldom, if ever, reduced prices of dynafocal mountings to quantity purchasers (*cf.* Finding 10, R. 38).[5] By 1944 prices charged by competitors for similar products were in general lower than those charged by petitioner (Finding 10, R. 39). Nevertheless, because of various factors, including the proven character and familiarity of petitioner's products, the engineering services which petitioner rendered to its customers, and its patent position, it continued to supply approximately 60 percent of all similar products (*ibid.*).

The court below discussed at considerable length a long series of negotiations in which the Army and Navy unsuccessfully attempted to persuade petitioner to reduce its long-established prices (Findings 11-18, R. 40-47). These findings are wholly irrelevant here. Suffice it here to say that in April 1944 the United States Navy was seeking to purchase four items (a mounting and parts therefor) made by petitioner and also by certain of its competitors. Bids were submitted by petitioner and several competitors. The Navy preferred petitioner's product but objected to petitioner's prices, and determined to procure petitioner's mountings by means of an order designated as "Compulsory Order No. 2" (Finding 19, R. 47-49).

On May 19, 1944, petitioner received from the Under Secretary of War a similar order designated as "Compul-

[5] Finding 10 in terms relates to all petitioner's products. In fact, however, plate form mounting prices were *always* reduced for quantity, as respondents' own witness testified (see R. 164, 165). There is no evidence to the contrary in the record. Petitioner is assigning error to the failure of the lower court to make this distinction. See petitioner's exception to Finding 10 (R. 192-193).

sory Order No. W 33-038 ac-2753", which required petitioner to deliver to the War Department specified quantities of various types of mountings (Finding 22, R. 51-54).

Neither of these orders specified the prices which would be paid. Subsequent letters from the respective departments fixed the prices to be paid for the mountings included in these compulsory orders (Findings 24, 43, R. 55, 81). Petitioner did not accept the prices thus fixed (Findings 20, 24, 27, 43, R. 50, 55, 57, 81).

On September 23, 1944, the Secretaries of War and Navy jointly issued to petitioner, under the authority of Title VIII of the Revenue Act of 1943, an "Order Fixing Fair and Reasonable Prices" designated as "Army-Navy Joint Re-pricing Order No. 1" (Finding 38, R. 69-72). Attached to the joint order as Exhibit A was a list of 655 items manufactured by petitioner, together with the prices petitioner was thereafter required to charge for each such article furnished to the War and Navy Departments, either directly, or indirectly under subcontracts (Finding 38, R. 72). These prices were calculated to return petitioner's cost, as closely as it could be estimated, plus 10 percent of such estimated cost (Finding 37, R. 69). These prices were less than petitioner's prices, were not satisfactory to it, and were not agreed to by it (Finding 40, R. 74).

During the period October 2 to October 25, 1944, petitioner made shipments under the two compulsory orders and the joint repricing order and received payment therefor at the prices fixed by respondent in the manner described above (Finding 48, R. 85). The aggregate difference between that payment and petitioner's list price, which is here claimed as just compensation, is $512,534.09. This is the total amount involved in this proceeding (Finding 49, R. 87).

The prices fixed by respondent under Compulsory Order No. 2, Compulsory Order W 33-038 ac-2753, and by Army-

Navy Joint Repricing Order No. 1 were in every case substantially lower than the prices established by petitioner in November 1939, over two years prior to the entry of the United States into the war (Findings 10, 40, R. 38, 74; see Exhs. 45-50, unpaginated Record volume). The prices thus fixed by respondent were in all cases substantially lower than the ceiling prices for petitioner's products fixed by the Office of Price Administration, whereas petitioner's list prices were in all instances either equal to or lower than the OPA ceiling price.[6]

Petitioner's products were readily saleable at their established prices at all times material to the present suit (see Finding 9, R. 38). Indeed, during the period of the takings, petitioner had large amounts of unfilled list-price orders on hand (*cf.* Finding 36, R. 67, and R. 133).

On October 25, 1944, petitioner's plant was seized, and thereafter was operated by the Secretary of the Navy pursuant to executive order (Finding 42, R. 81). During the period of Navy operation, the Navy charged petitioner's established list prices for all deliveries made to civilian purchasers and Government departments other than the Army and Navy[7] (R. 120-121, 180-181).

The court below held that petitioner's products had been taken, within the meaning of the Fifth Amendment. It also held, however, that the amounts received by petitioner under the three compulsory orders constituted just compensation. While conceding that market value is ordinarily the best measure of just compensation, the court stated

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[6] See Max. Price Reg. 149, 7 Fed. Reg. 3889 (issued May 22, 1942), which fixed the ceiling price as the price charged on January 5, 1942. Petitioner has assigned error to the refusal of the court below to find that petitioner's products were subject to OPA ceilings, and that in each case the price set by petitioner was equal to or lower than the ceiling prices fixed (see petitioner's requested Finding 51, R. 195).

[7] Petitioner has assigned error to the refusal of the court below to make this finding (see petitioner's requested Finding 51, R. 195).

that there was no "free and untrammeled market" for petitioner's products because (1) the rubber used in petitioner's mountings was allocated by respondent and could not have been used by petitioner except in furtherance of the war effort, and (2) the mountings were "controlled" by patents which constituted a "concession" to petitioner by respondent. The court added that it was "unthinkable" that any plaintiff should receive as just compensation amounts that would give it a "profit" of more than 50 percent on cost when other businessmen "were willingly accepting" profits of 10 percent (R. 100-101).

Specification of Errors to Be Urged

The court below erred:

1. In failing and refusing to hold that the market price for petitioner's products existing at the time and the place of the taking was the proper measure of just compensation to petitioner.

2. In holding that the profit which petitioner would make was a basis for ignoring the existing market price.

3. In holding that, in the taking of patented products, any value attributable to the patents should be excluded in determining just compensation for the reason that patents are in the nature of a concessison by the Government.

4. In holding that the market price existing at the time and the place of taking could be ignored because the raw materials from which the products were made might have been, but were not, withheld from petitioner under the Government's wartime powers of allocation.

5. In failing and refusing to find that petitioner's patents covering the products here involved were valid.

6. In failing and refusing to find that virtually every

one of the products of petitioner here involved was also produced by one or more of petitioner's competitors.

7. In failing and refusing to hold that prices had been established by petitioner for most of its products here involved as early as 1933.

8. In failing and refusing to hold that petitioner did not at all times make price reductions for quantity purchases of plate form mountings.

9. In failing and refusing to hold that petitioner's products were each subjected to OPA ceiling prices, and that in each case the price set by petitioner was at or below the ceiling price.

10. In failing and refusing to hold that at the time petitioner's products were taken by respondent, they were readily saleable at their established prices and that the demand for them would continue.

11. In failing and refusing to hold that when, immediately after the taking here involved, respondent seized petitioner's plant, it continued to sell petitioner's products at petitioner's established prices to everyone except the Army and Navy.

12. In failing and refusing to hold that petitioner's established prices were not the proper measure of respondent's liability for the taking of petitioner's products.

13. In failing and refusing to give judgment for petitioner in the amount of $512,534.09, plus interest, representing the difference between what respondent has paid for petitioner's products, and the just compensation to which it is entitled therefor.

14. In entering judgments dismissing the petitions.

Reasons for Granting the Writ

Several times in the past few terms the Court has recognized, by reviewing on certiorari the decisions of lower courts, that the proper enforcement and application of the just compensation clause of the Fifth Amendment is of vital importance in constitutional litigation. *E.g., United States* v. *Toronto, Hamilton and Buffalo Navigation Co.*, No. 39, October Term, 1949, decided December 12, 1949; *United States* v. *Cors*, 337 U. S. 325; *United States* v. *John J. Felin & Co.*, 334 U. S. 624; *United States* v. *Petty Motor Co.*, 327 U. S. 372; *United States* v. *Miller*, 317 U. S. 369.

After both World Wars, the unusual circumstances and unusual needs of the Federal Government have required re-interpretation and reaffirmation of basic principles by this Court.

Such is the need here. The court below, as its opinion shows, was actuated by motives which on the surface appear commendable. But in striving to avoid what it conceived to be an injustice, it has in fact negated what Mr. Justice Douglas has called "the political ethics reflected in the Fifth Amendment." *United States* v. *Cors, supra,* at p. 332. In an opinion which appears to be flatly inconsistent with the opinions of this Court, the lower court not only denied just compensation to this petitioner, but also purported to establish principles which may be employed in the future, in other situations, to justify other confiscatory takings of property.

Petitioner's position, as respondent will no doubt stress, is unique or almost unique; only a few others, at most, were subject during the war to compulsory pricing orders. Yet when one examines the principles which the court below purports to establish, it is apparent that they are not confined in their application to this case, or to the situation created by the repricing statutes. Some of the principles

enunciated in the court's opinion apply to *all* takings, others to any taking of patented articles.

It is almost unnecessary to add that the decision is in probable conflict with several decisions of this Court.

I

The Decision Below Is in Probable Conflict With Several Decisions of This Court

United States v. *New River Collieries Co.*, 262 U. S. 341, is only one of many cases which make it clear that (p. 344):

> "Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. * * * More would be unjust to the United States and less would deny the owner what he is entitled to."

That is not to say that "market price" is the only measure of value. There may be circumstances where some elements included in market value must be excluded—special values to the taker, or to the owner, for example. There may be no market price at all. But, as stated in an opinion of this Term (*United States* v. *Toronto, Hamilton and Buffalo Navigation Co.*, No. 39, decided December 12, 1949):

> "* * * the balance between the public's need and the claimant's loss has been struck, in most cases, by awarding the claimant the monetary 'market value' of the property taken. * * * Usually that is a practical standard; usually that approaches the 'just' compensation demanded by the Fifth Amendment."

Here there can be no doubt that a market price existed at the time and place of the taking, yet the court below ignored it. The reasons for ignoring it, so far as they can be extracted from the court's opinion, are wholly un-

supported by any decision of this Court. There are many decisions of this Court which are directly inconsistent. The result is a denial to petitioner of the compensation to which the Constitution entitles it.

A. There Was a Market Price for Petitioner's Products—Its List Price—Existing at the Time and Place of the Taking

Petitioner's property was taken by respondent between October 2 and October 25, 1944. In June 1944, as respondent's own evidence showed, petitioner had on its books more than $15,000,000 in unfilled orders at its prices (R. 133). Respondent's own accountants estimated, at that time, that petitioner's monthly sales volume of more than $2,700,000 would continue well into 1945 (R. 133). Although the Court of Claims refused to make appropriate findings (for which error has been assigned), it tacitly admitted the existence of the market for petitioner's products. Respondent has never challenged the fact that, absent the taking, petitioner could have, and would have, sold the requisitioned items at its list prices; indeed, it conceded this in its brief in the court below (p. 293).

We might well stop here, and proceed to the reasons upon which the court below relied in ignoring these market prices. There are, however, other factors which emphasize the propriety of the market price for petitioner's products as the measure of just compensation for these products.

1. *The OPA ceilings.*—As the Statement above shows (p. 8), the prices for all of petitioner's products were subject to OPA ceilings. In each case, the list, or market, price for the mountings was equal to, or lower than, the applicable ceiling. Under MPR No. 149 (7 Fed. Reg. 3889) ceiling prices were set at prices prevailing on January 5,

1942, and in no instance were petitioner's prices increased after that date. Some were lowered. There has been no claim by respondent that petitioner's list prices were illegal under OPA, and petitioner has never claimed that it should receive more than the OPA permitted. *Cf. United States* v. *John J. Felin & Co.*, 334 U. S. 624.[8]

2. *The history of petitioner's prices.*—A second factor of importance here is the conclusive proof that petitioner's list prices—the market value—were in no sense a reflection of wartime inflation. Petitioner fixed its prices for a great many of these products in 1933,[9] when it was actually operating at a loss (see Finding 6, R. 35). As has been shown in the Statement (*supra*, p. 5), the only increase in most prices was a flat 15 percent across-the-board increase in 1939. Prices on some of the most important mountings (dynafocals) were reduced in 1942. These products had been sold, for years prior to October 1944, at the price which petitioner now claims as just compensation. *Cf. United States* v. *Cors*, 337 U.S. 325.

3. *The existence of the market price after the taking.*—Lest there be any doubt as to the existence of a market price—petitioner's list price—at the time of the taking, it should be pointed out that *respondent itself* established petitioner's list prices as the prices for which it sold—except to its own military departments—the products of petitioner. Respondent operated and controlled petitioner's factory from October 25, 1944 through the Navy Department (Finding 42, R. 81). During the period from October 25, 1944 onward, the policy which was followed was stated to be

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[8] In its petition for certiorari in a case now pending before the Court (*United States* v. *Commodities Trading Corp.*, No. 156, October Term, 1949) the respondent stated (p. 18): "• • • properly established [OPA] ceiling prices reflect a fair market value, at least where active and substantial trading has taken place thereunder." See also p. 17.

[9] See Exhs. 45-50, unpaginated Record volume.

(R. 180): "all items sold for non-Army-Navy end-use, have been sold at the regular Lord Manufacturing Co. prices existent as of October 24, 1944." Employees of the Navy were ordered to make certain that all sales of petitioner's mountings for use by others than the Army or Navy were made at the identical list prices that respondent seeks to avoid paying as just compensation (see R. 180).

We have, in other words, the anomaly of the United States Government requisitioning property at a price far below that at which it was itself selling the identical property to some of its agencies and to the general public. There can be no clearer demonstration of the existence of the market value claimed here by petitioner, but denied by the court below.

B. The Record Supplies No Basis for Ignoring Market Value

The foregoing discussion demonstrates that there was a market value for the requisitioned property, which fairly represented "what a willing buyer would pay to a willing seller". *United States* v. *Miller*, 317 U.S. 369, 374. Petitioner's prices were not inflated by wartime conditions, or by the peculiar needs of the taker. They were not affected by any peculiar value of the property to the owner. This was a long-established market price, tested in both war and peace, which persisted even after the taking. And it was legal under OPA regulations. We submit that this market price *is* "just compensation", and that the purported bases upon which the court below rejected it were wholly unjustified. To them we now turn.

Fairly analyzed, the opinion below appears to advance three reasons for ignoring market price as the measure of just compensation. These were (1) "the *profits* which plaintiff demanded were all out of line with wartime conditions" (R. 101); (2) the products taken were covered by

patents, and patents are "in the nature of a concession by the Government" (R. 100); and (3) there was no "free and untrammeled market" because at the time of the taking there was a rubber shortage and petitioner "could not have secured . . . a single pound of rubber" for use in its mountings without the allocation of rubber made by respondent (R. 100). None of these reasons has any legal or logical validity.

1. *Profits are irrelevant to the determination of just compensation for property having a fair market value. The contrary holding of the court below is in probable conflict with decisions of this Court.*

The court below, in its long discussion of the efforts by Army and Navy procurement officers to negotiate a lower price; in its emphasis on the percentage and amount of profit that petitioner would make at its list prices; and in its statement that permitting petitioner such profits would be "unthinkable" (R. 101), has evidenced its preoccupation with facts that are legally irrelevant.

It is on this point that the conflict with the decision in *United States* v. *New River Collieries Co.*, 262 U.S. 341, is most apparent. In that case, the coal company proved the existence of a market price for the coal that had been requisitioned. In awarding that market price as just compensation, this Court stated (262 U.S. at p. 344):

> "The court below excluded evidence offered by the United States to show the owner's cost of production and a reasonable profit. This ruling was right, because it was shown beyond controversy that there were market prices prevailing when and where the coal was taken. The United States had the right to take the coal on payment of these prices; the owner was not entitled to more and could not be required to take less. The owner's cost, profit or loss did not tend to prove

market price or value at the time of taking, and was therefore immaterial."

Indeed, this must be so. Just compensation "is for the property, and not to the owner". *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 326. The United States might well have requisitioned some of these mountings from a private person who had bought them from petitioner at list price. Even under the "profit" rationale advanced by the Court of Claims, that person would be entitled to just compensation measured by the list price, for which he could have sold the mountings.[10] Certainly it is not possible that just compensation for identical property can differ depending on the person from whom it is taken. "The public may not by any means confiscate the benefits or be required to bear the burden, of the owner's bargain." *Olson* v. *United States,* 292 U. S. 246, 255.

Cost-plus-reasonable-profit has never been even evidence of just compensation when a market price exists. "It is the property and not the cost of it that is safeguarded by state and federal constitutions." *Olson* v. *United States, supra,* at p. 255. The decision below is in conflict with this well-settled principle.

This is not to say that the Government cannot make "profits" in wartime a matter of its proper concern. Both by the excess profits tax, and by processes of renegotiation, the amount of profit permitted to a person or business has been subjected to control. It is wholly unnecessary to pervert the concept of just compensation guaranteed by the Fifth Amendment in a mistaken effort to protect the public welfare. The task of the court below was to establish the pecuniary equivalent of the property taken, not to pass judgment on how much of that pecuniary equivalent

[10] Conceivably, the Court of Claims would award him a "reasonable profit" in addition.

this particular petitioner was entitled to have. That function, apart from the tax statutes, has been assigned to administrative officials and, failing agreement on their determination, to the Tax Court, which has its own rules, principles and standards. The Tax Court procedures have been approved by this Court, but no one heretofore has suggested that they are the rules by which just compensation is to be determined when property is requisitioned. Plainly, they are not, and no amount of hyperbole can make profit relevant in this case.

2. *Patents are not "concessions" by the United States which may be revoked or ignored when it takes property. The contrary holding of the court below is in probable conflict with decisions of this Court.*

The Court of Claims implied that part of what it deemed the excessive market value of petitioner's property was attributable to the patents covering that property. This is undoubtedly the fact. But, the court held, the contribution of the patents to this market price must be disallowed because patents are "in the nature of a concession by the Government" (R. 100). This conclusion is incorrect, both as a statement of law, and as a reason for disregarding market value.

The Congress is authorized by Article I, Section 8 of the Constitution to make laws "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries". The patent statutes enacted pursuant to this authority accordingly grant to inventors the means of securing limited monopolies for limited periods of time. Congress has seen fit to attach no strings to the patents issued under these laws: "The primary purpose of our patent system is not reward of the individual but the advancement of the arts and sciences." *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U.S. 327,

330-331. Because of that fact, this Court has repeatedly held that the United States has no more right to the free use of the invention secured by a patent granted by it than has any private person. See *Belknap* v. *Schild*, 161 U.S. 10, 15-16, and cases there cited. It must purchase rights to the invention or pay just compensation therefor.

The holding of the court below that patents are a "concession" which can be withdrawn or revoked by the United States is in probable conflict with many decisions of this Court. We have already referred to *Belknap* v. *Schild, supra*. *Crozier* v. *Krupp*, 224 U.S. 290, is a landmark opinion in this field. In *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtis Marine Turbine Co.*, 246 U. S. 28, 39-40, the law was deemed so well settled as to warrant the following statement in a unanimous opinion:

> "At the time of the enactment of the law of 1910 the following principles were so indisputably established as to need no review of the authorities sustaining them * * * (a) That rights secured under the grant of letters patent by the United States were property and protected by the guaranties of the Constitution and not subject therefore to be appropriated even for public use without adequate compensation."

Again, and more recently, in *United States* v. *Dubilier Condenser Corp.*, 289 U.S. 178, the Court stated (p. 189):

> "The title of a patentee is subject to no superior right of the Government. The grant of letters patent is not * * * a matter of grace or favor * * *. And this court has held that the Constitution evinces no public policy which requires the holder of a patent to cede the use or benefit of the invention to the United States, even though the discovery concerns matters which can properly be used only by the Government; as, for example, munitions of war."

Moreover, there is no warrant whatever for holding that because an article is patented, *ipso facto* no "free

and untrammeled" market price exists, and that therefore just compensation must become cost-plus-reasonable-profit. In the first place, the statutory monopoly granted by petitioner's patents had no effect upon the market for petitioner's products insofar as Government end use was concerned, since under the Act of 1910 (35 U.S.C. § 68) the Government could, and did, authorize manufacture by infringers.[11] There was, accordingly, a free and untrammeled market in which competitors of petitioner could and did manufacture and sell patented inventions for Government end use.

In the second place, even as to civilian use, the most that can be said is that petitioner's patents helped to make its products unique, for no less than nine competitors were able to make imitations and substitutes. If there was no "competitive" market in respect to civilian use, it was because the other manufacturers could not make mountings of the same quality or under the same patents (see Finding 9, R. 38). But the advantage which petitioner's patents gave it was an advantage to which petitioner is fully entitled by the patent laws. As this Court stated in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 65:

> "To say that the world is not recompensed for the price it pays [for a patented product] is to attack the policy of the law, is to defy experience and to declare that the objects of inventive genius all around us have contributed nothing to the advancement of mankind."

See, to the same effect, *United States* v. *General Electric Co.*, 272 U.S. 476, 490; *United States* v. *Line Material Co.*, 333 U. S. 287, 319.

The facts of this case bear out this common experience. Petitioner, here, has done exactly what is contemplated by

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[11] Petitioner's only remedy for this Government-authorized infringement was by suits in the Court of Claims. Two suits are now pending in that court on these infringements. Docket Nos. 47714, 47715.

the Constitution and the patent statutes. Without cross-licenses, patent pooling, or any of the other latter-day refinements, it has made and sold the inventions patented and has built up a business in these inventions upon the grant by the United States of the exclusive right to make, use and vend the inventions. These inventions certainly promoted the progress of science and useful arts. Petitioner's customers preferred its mountings, at its prices, to the substitutes offered by competitors, and had bought them in large quantities for many years before the takings here (Findings 6, 9, R. 34-35, 38). The Navy Department, in taking some of the property involved in this very case, preferred to embark upon the long and cumbersome process now here ending to obtain petitioner's mountings rather than to purchase substitutes offered to it at a lower price (Finding 19, R. 47). These facts demonstrate the advantage which petitioner's patents gave it and to which it was lawfully entitled. We search the opinions of this Court in vain for any authority even suggesting that this advantage may constitutionally be ignored in determining just compensation.

3. *The fact that rubber was allocated to petitioner is of no significance*

The opinion of the court below states (R. 100):

> "It is true that frequently market value is the best yardstick for determining just compensation, and is therefore usually applied where there is a free and untrammeled market. But here there was no such market. As a matter of fact, there was a tremendous shortage of rubber and every pound of that rubber was needed in the war effort. The need was so great that it was completely controlled by allocation. Therefore, unless plaintiff's business were linked to the war effort it could not have secured or used a single pound of rubber."

With due deference, that is a complete *non sequitur*. There is no evidence in the record, nor has respondent ever asserted, that the wartime shortage of rubber had anything to do with the level of the market price for the products here involved. Indeed, there is a specific finding that petitioner's prices had been set in a peacetime market years prior to the time of the taking (Finding 10, R. 38), and in many cases had been changed only once since 1933 (*cf.* Exhs. 45-50, unpaginated Record volume).

It is quite true that no one should be permitted to advantage himself from an artificially high price level caused by wartime needs of the Government. *United States* v. *Cors*, 337 U.S. 325. But it is equally true that the Government cannot set its own valuation—for just compensation purposes—on requisitioned property simply because it could have kept that property from coming into existence by exercise of its lawful powers of allocation. *Cf. International Paper Co.* v. *United States*, 282 U.S. 399, 408. Yet on the facts in this case, that is what the Court of Claims has held.

II

The Questions Involved Are Important

In *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 324, Mr. Justice Brewer introduced his discussion of just compensation by stating:

> "Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."

This is not to say that this Court should review all just compensation cases. It should, however, recognize that such cases do present a matter of special concern; a matter in which this Court should be alert to prevent injustice. Most of the recent cases in which review by this Court has been granted have been those in which the United States complained of the injustice of a just compensation award (see p. 11, *supra*). It is equally important, of course, that injustice not be imposed upon the claimant, and that no principle be established which will impair the guarantees of the Fifth Amendment.

The matter is particularly important because the Court of Claims is the forum in which the large majority of significant just compensation cases are heard and decided. Many such cases arising out of the recent war are pending there now; many others will no doubt be filed within the six years following the end of the war. If this decision is permitted to stand, it may well be deemed to have established principles which will seriously jeopardize the rights of future claimants, and to have qualified principles and precedents enunciated in many opinions of this Court.

If, as we believe, the principles which the court below has enunciated in this case are wrong, present review and correction by this Court are fully warranted.

Conclusion

Wherefore, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. HORSKY,
RALPH HAMMAR,
EDWARD G. HOWARD,
Counsel for Petitioner.

December 30, 1949.

APPENDIX A

Section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892, as amended by 57 Stat. 164; 50 U.S.C. App. § 309) provides as follows:

"Sec. 9. The President is empowered, through the head of the War Department or the Navy Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

"Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition or parts of ammunition, or any necessary supplies or equipment for the Army or Navy, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War or the Secretary of the Navy shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execu-

tion of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War or the Secretary of the Navy, or who shall refuse to furnish such arms, ammunition, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War or the Secretary of the Navy, as the case may be, then, and in either such case, the President, through the head of the War or Navy Departments of the Government, in addition to the present authorized methods of purchase or procurement, is hereby authorized to take immediate possession of any such plant or plants, and through the appropriate branch, bureau, or department of the Army or Navy to manufacture therein such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and a fine not exceeding $50,000.

"The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just: *Provided,* That nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security, and employment standards of the employees in such plant.

"The first and second provisos in section 8 (b) of the Act entitled 'An Act to expedite national defense, and for other purposes', approved June 28, 1940 (Public Act Numbered 671, Seventy-sixth Congress), are hereby repealed. * * *"

APPENDIX B

Title VIII of the Revenue Act of 1943 (58 Stat. 92; 50 U.S.C. App. § 1192) provides as follows:

"TITLE VIII—REPRICING OF WAR CONTRACTS

"SEC. 801. REPRICING OF WAR CONTRACTS.

"(a) As used in this section the terms 'Department', 'Secretary' and 'article' shall have the same meanings as in subsection (a) of the Renegotiation Act.

"(b) When the Secretary of a Department deems that the price of any article or service of any kind, which is required by his Department or directly or indirectly required, furnished, or offered in connection with, or as a part of, the performance or procurement of any contract with his Department or of any subcontract thereunder, is unreasonable or unfair, the Secretary may require the person furnishing or offering to furnish such article or service to negotiate to fix a fair and reasonable price therefor. If such person refuses to agree to a price for such article or service which the Secretary considers fair and reasonable, the Secretary by order may fix the price payable to such person for furnishing such article or service after the effective date of the order, whether under existing agreements or otherwise. The order may prescribe the period during which the price so fixed shall be effective and such other terms and conditions as the Secretary deems appropriate.

"(c) Any person aggrieved by an order fixing a price under this section may sue the United States in any appropriate court. In such suit, such person shall be entitled to recover from the United States the amount of any difference between (1) fair and just compensation for the articles and services furnished under the terms of the order and (2) the price fixed for such articles and services by the order; but if the prices so fixed by the order are found to exceed fair and just

compensation for such articles and services, such person shall be liable to the United States in such suit for the amount of this excess. Any such suit shall be brought within six months after the order by the Secretary on which it is based, or after the expiration of the period or periods specified in such order, whichever last occurs. Such a suit shall not stay the order involved.

"(d) Whenever any person wilfully refuses, or wilfully fails to furnish any such articles or services at the price fixed by an order of the Secretary in accordance with this section, the President shall have power to take immediate possession of the plant or plants of such person and to operate them in accordance with section 9 of the Selective Training and Service Act of 1940, as amended.

"(e) The authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

"(f) Every purchase order or agreement, or contract to make or furnish any article or service of any kind, which is required by a Department or directly or indirectly required, furnished or offered in connection with, or as a part of, the performance or procurement of any contract with such Department or of any subcontract thereunder, shall, if made thirty days or more after the date of the enactment of this Act, be deemed to contain a provision under which the person making or furnishing such article or service agrees that notwithstanding other provisions of the purchase order, agreement, or contract, he shall be entitled to receive for such article or service only the fair and just compensation provided for in subsection (c).

"SEC. 802. EFFECTIVE DATE.

"(a) Section 801 shall be effective from the date of the enactment of this Act.

"(b) Section 801 shall not apply to any contract with a Department or any subcontract made after the date proclaimed by the President as the date of the termination of hostilities in the present war or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 570

LORD MANUFACTURING COMPANY,
Petitioner,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The petition for a writ of certiorari was timely filed on January 31, 1950. Due to the necessity for printing the record and petition by the Clerk (Rule 41, par. 1), the petition has not yet been printed and served on the United States. Since January 31, 1950, this Court has, on March 27, decided *United States* v. *Commodities Trading Corp.*, Nos. 156 and 163—a case which has a direct and immediate

application to the instant case. The Memorandum attached hereto comments briefly on that case. Since the time for respondent to respond to the petition has not yet even begun to run, the consideration of this supplemental memorandum will not in any way prejudice respondent, or delay the final disposition of this case.

Wherefore, petitioner respectfully moves for permission to file the Memorandum hereto attached.

CHARLES A. HORSKY,
Counsel for Petitioner.

April 4, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 570

LORD MANUFACTURING COMPANY,
Petitioner,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Since the filing of the petition for certiorari in this case on January 31, 1950, there has been, on March 27, 1950, a further decision of this Court which is highly relevant to the issues presented by the petition, and which therefore should be brought to the attention of the Court.

On March 27, 1950, the Court handed down its opinion in *United States* v. *Commodities Trading Corp.*, Nos. 156 and 163. The petition for certiorari in the instant case refers to the *Commodity Trading Corp.* case (ftn. 8 p. 14) but only to quote from the petition for certiorari filed by the United

States in that case. The opinion warrants brief further comment.

In the *Commodities Trading Corp.* case the issue was as to the "just compensation" for pepper, purchased by the corporation at prices higher than the OPA ceiling price. The court below, in reaching a conclusion that the OPA ceiling price was not "just compensation", considered, among other factors, "how much the precise pepper cost Commodities" (Op. p. 1). In this Court, the corporation urged that it had paid more than the OPA ceiling price for the pepper, and that this was a "special circumstance" (Op. p. 8) sufficient to make the ceiling price inapplicable in determining "just compensation". The United States asserted that, in fact, the cost was lower than the ceiling price. This Court said (Op. pp. 8-9):

> "We do not consider these contentions of the Government because we think that the cost of the pepper delivered provides no sufficient basis for specially excluding Commodities from application of the ceiling price. The general rule has been that the Government pays current market value for property taken, the price which could be obtained in a negotiated sale, whether the property had cost the owner more or less than that price. *Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340."

Here, similarly, as we have already pointed out in the petition, the court below gave its primary attention to the *cost* of the requisitioned items to petitioner, and denied relief because it thought the amount of profit inuring to petitioner on such costs was too high. Its error in each case, in relying on irrelevant facts, is patent. One case, in which the United States was prejudiced by the error, has now been corrected by this Court. The other case, equally serious, in which it is the citizen who has suffered, should likewise be corrected.

We respectfully suggest that, in the light of the *Commodities Trading Corp.* case, not only should the petition be granted, but the decision below may properly be reversed, with instructions to enter judgment for petitioner for the amount claimed, without further briefs or argument.

Respectfully submitted,

CHARLES A. HORSKY,
RALPH HAMMAR,
EDWARD G. HOWARD,
Counsel for Petitioner.

April 4, 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 570

LORD MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 31-101) is reported at 84 F. Supp. 748.

JURISDICTION

The judgment of the Court of Claims was entered on July 11, 1949 (R. 102). Petitioner's motion for a new trial, seasonably filed, was denied on October 3, 1949 (R. 102). By order of Chief Justice Vinson, dated November 1, 1949, the time for filing a petition for a writ of certiorari was extended to February 16, 1950 (R. 217). The petition for a writ of certiorari was filed on January 31, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether, in the circumstances of this case, an award fixed on the basis of petitioner's costs in full, as shown by its books, plus 10% profit, consti-

tutes "fair and just compensation" for necessary war goods furnished under orders issued, in 1944, by the War and Navy Departments pursuant to Section 9 of the Selective Training and Service Act of 1940 (providing for mandatory orders to produce war materials) and to Title VIII of the Revenue Act of 1943 ("Repricing of War Contracts").

STATUTES INVOLVED

The pertinent provisions of Section 9 of the Selective Training and Service Act of 1940 (Act of September 16, 1940, c. 720, 54 Stat. 885, 892, 50 U. S. C. App. 309) and of Title VIII of the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VIII, 58 Stat. 21, 92, 50 U. S. C. App. 1192) are set forth in the Appendix, *infra,* pp. 31-35.

STATEMENT

In 1944, petitioner furnished aircraft mountings to the War and Navy Departments (Services) under (1) two orders, one issued by each of the Services under Section 9 of the Selective Training and Service Act (Appendix, *infra,* pp. 31-33), requiring petitioner to deliver to the Services specific quantities of its mountings, (2) two contracts wherein petitioner agreed to deliver certain of its mountings to the Navy at prices which, if they could not be redetermined by mutual agreement, should be fixed by the Secretary of the Navy under Title VIII of the Revenue Act of 1943 (Appendix, *infra,* pp. 33-35), and (3) a repricing order issued jointly

by the services under Title VIII and applicable to all products thereafter furnished, directly or indirectly, to the Services. Section 9 empowered the Government to place mandatory orders to produce war goods, and provided for the payment to the manufacturer of compensation which "shall be fair and just". Title VIII authorized the unilateral fixing or refixing by the Government of prices of articles required for war contracts and subcontracts, if a "fair and reasonable price" could not be negotiated with the contractor, and established ultimate court determination of "fair and just compensation for the articles and services furnished under the terms of the [price-fixing] order." The Services determined the statutory "fair and just" compensation for the mountings supplied under the above orders and contracts by fixing a price which allowed petitioner's costs in full as shown by its books plus a profit of 10%.

Petitioner, dissatisfied with this award, filed two complaints in the Court of Claims, one on September 28, 1945 (amended on April 8, 1948), under Section 801(c) of Title VIII (R. 1-17), and the other on September 5, 1946, under Section 9 (R. 18-30). In these complaints, petitioner claimed that its established list prices should be accepted as the measure of compensation (R. 11, 20), and sought judgment of $512,534.09, the difference between its list prices and the compensation fixed by the Services (R. 12, 21, 87). The Court of Claims, however, after making extensive and detailed findings of

fact (R. 31-87), approved the Services' determination as fixing the "fair and just" compensation prescribed by these statutes (R. 100). The facts found by the Court of Claims, and on which it based its conclusion, may be summarized as follows:

A. *Background:* Petitioner, a Pennsylvania corporation with its principal place of business in Erie, Pennsylvania,[1] is engaged in the manufacture of devices called "mounts" or "mountings" which are designed to absorb vibration (R. 31-32). H. C. Lord initially manufactured mounts for use in industrial equipment but subsequently made them for use in aircraft where the absorption of vibration is of vital importance, due to the necessity of protecting sensitive flight instruments from the vibration of heavy engines (R. 32).[2] During the course of the years, patents were secured by Lord and his son, Thomas, both on developments of their own and by acquisition (R. 34, 81).[3]

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[1] Petitioner's business was founded as an individual enterprise in 1919 by H. C. Lord, a patent attorney. In 1935, a partnership was formed between H. C. Lord and Blanche M. Hartman (now Mrs. H. C. Lord) with interests of 90% and 10% respectively. The transition to the present corporate form took place in 1940. During the years 1940-1944, H. C. Lord was president of the corporation and owned 50% of the stock; Mrs. H. C. Lord, secretary-treasurer, owned 33% of the stock and Thomas Lord, H. C. Lord's son, was vice-president, with 17% of the stock (R. 31-32).

[2] Up to the early 1930's, all-weather flying was virtually impossible because flight instruments did not give consistently accurate readings on account of destructive vibrations transmitted to the instruments from the aircraft's frame (R. 32).

[3] The Army considered the problem of vibration absorption in aircraft of such importance that in 1934 it established a special laboratory in Wright Field to aid in its solution. Ex-

The court below stated that gradually Lord's aircraft mounts became generally accepted by the industry, almost to the complete exclusion of other products; from 1932 to 1942, petitioner occupied "a dominant place in that field with little or no real competition" (R. 34-35).[4] One or two competitors entered the field in 1941, followed to a larger extent during 1942 and 1943 by others; these competitors, however, manufactured only one or very few types of these products (R. 37, 38). Petitioner remained the only concern producing a full line and for many items was the sole source of supply (R. 37-38).[5] All during the war period petitioner, its subcontractors working under its instructions, and its competitors generally worked

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tensive work was carried on especially by one W. E. Stitz, a War Department aeronautical engineer. In 1939 Stitz obtained a patent on a mounting which he developed and which was an improvement on the Lord mounting. Stitz assigned his patent shortly after its issuance to Lord, "subject to a license retained by the United States Government for governmental purposes" (R. 34).

[4] The so-called Lancaster mounting was used by the Navy until 1938 when it was replaced by the Lord mounting (R. 33).

[5] During the early years of the war, petitioner's products were the only ones approved under Army specifications (R. 35, 40). Moreover, where petitioner's mounts were already in use, competitors' products were not always interchangeable and it was therefore necessary to obtain petitioner's parts for maintenance purposes. None of the competitors had the background of petitioner's engineering experience and research and, as a rule, engineering services comparable to petitioner's were not furnished to the purchasers of their products. In addition, purchasers were often reluctant to take the new firms' products in place of those of petitioner which were of a high character and had proved satisfactory over several years of use and with which they were familiar. (R. 38.)

at full capacity in order to supply the needs of the Services (R. 38).

Petitioner first began to show profits in 1935 and thereafter earned slowly increasing profits until 1940 (see chart *infra;* R. 35). With the commencement of the National Defense program and the placement of large orders for aircraft by the War and Navy Departments, petitioner's profits increased tremendously due to the great demand for the aircraft mountings (R. 35).[6] The following chart sets forth petitioner's total sales and profits (before taxes and renegotiation)[7] from 1936-1943 and for the first ten months of 1944 (R. 35):[8]

Year	Sales	Profits	Percentage of profit on cost
1936	$138,676.95	$36,594.43	43.05
1937	181,860.47	38,285.38	32
1938	217,495.72	49,174.15	35.92
1939	414,493.19	125,183.68	53.83
1940	2,167,621.11	1,225,092.23	172.18
1941	4,952,433.59	2,857,692.80	168.13
1942	13,901,571.19	7,328,588.35	123.10
1943	29,266,080.49	12,077,313.59	74.08
1944 (10 mos.)	28,052,766.02	9,769,274.25	56.28

[6] Until 1940, petitioner was still a relatively small concern. On April 1, 1940, petitioner had only 170 employees but, by the end of 1942, the number of its employees had increased to 1850 (R. 35).

[7] Determinations were made under the Renegotiation Act that petitioner's profits were excessive in the amount of $5,200,000 for 1942, $10,250,000 for 1943, and $7,750,000 for 1944. Petitioner has filed petitions in the Tax Court of the United States contesting these determinations and claiming it realized no excessive profits during the years in question. These suits are now pending. *Lord Mfg. Co.* v. *United States,* T. C. 22-R (1942); *Lord Mfg. Co.* v. *War Contracts Price Adjustment Board,* T. C. 353-R (1943); T. C. 603-R (1944).

[8] During these periods, Lord, his wife and son received the following amounts as salaries, partnership profits, and corporation dividends (R. 36):

Petitioner had developed and put on the market the products here involved before our entry into war (R. 38). With little competition in some instances, and in most instances without any competition, petitioner established prices prior to the war which were continued with little or no changes until October 2, 1944, the effective date of the Title VIII repricing order involved here (*infra*, pp. 14-18; R. 38). These prices were based not upon any fixed formula or percentage of profit, but "what the traffic would bear" (R. 38).[9] The only general price change of consequence during its entire existence was a general 15% increase made in November 1939 (R. 38). Petitioner was generally successful in resisting efforts to secure price reductions and consistently refused to give cost breakdowns to prospective purchasers (R. 38-39). When faced with a competitive situation as to some of its products during the war period, petitioner sought to stifle competition by notifying prospective pur-

Year	H. C. Lord	Thomas Lord	Mrs. H. C. Lord
1936	$40,994.03	$5,050.00	$4,554.89
1937	46,672.24	5,327.27	5,185.80
1938	59,708.65	6,010.20	6,634.29
1939	150,978.63	7,496.59	16,773.40
1940	160,617.09	79,375.00	36,591.03
1941	109,500.00	135,000.00	49,500.00
1942	109,500.00	135,000.00	49,500.00
1943	109,500.00	135,000.00	49,500.00
1944	109,500.00	135,000.00	49,500.00

The net worth of the business increased from about $130,000 in 1936 to about $1,000,000 in 1940, to 4½ million dollars in 1944; this increase was attributable solely to the reinvestment of profits (R. 36-37).

[9] In almost all cases, particularly for its most important product, the expensive so-called dynafocals, no reduction in price was allowed for large orders (R. 38).

chasers of competing products as to its patent holdings and their potential liability for patent infringement, with the result in many instances that the prospective purchaser sought petitioner's product even at a somewhat higher price rather than risk incurring liability for patent infringement (R. 39).[10] Although the competitors' prices became generally lower than petitioner's,[11] for various reasons, including the patent situation and desperate need for mounts (see, fn. 5, *supra*, p. 5), petitioner supplied to the Services about 60% of all aircraft mounts during the war years (R. 39). These mounts were both sold directly to the Services and also supplied to airplane manufacturers who had prime contracts with the Government (R. 39). "Because of the conditions under which these mounts were produced and sold by [petitioner], both prior to and during the war period, the prices charged therefor by [petitioner] were not fixed in a real competitive market" (R. 39).

In August 1942, after a short period of letting contracts without requiring estimates of costs or profits, the Air Force adopted the common business practice of requiring contractors in fixed price

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[10] Petitioner consistently refused, even during the war, to grant any of the many requests for licenses under its patents (R. 82).

[11] Initially, the competitors' prices did not differ greatly from petitioner's. In some instances, they were higher and in others they were lower. But with the acquisition of experience and increase in volume, the competitors' prices were reduced until, by 1944, they were generally lower than petitioner's. (R. 39, 82-85.)

prime contracts over $25,000 to submit cost breakdowns and proposed profits (R. 40).[12] While there was no fixed limitation on allowable profits, the system was designed not only to prevent excessive profits but to allow profits commensurate with the risks assumed and services performed (R. 41). The profits allowed normally ranged from 6% for manufacturers such as petitioner, who were merely continuing to manufacture their normal peacetime products, to 10% for contractors venturing new untried fields or performing extraordinarily difficult operations (R. 41).[13] This system received an almost unanimous acceptance by contractors and under it approximately 77 billion dollars worth of materials and supplies were procured (R. 42). Although most large procurements involved patented items, no claim was made, except by petitioner, that contractors thereby became entitled to larger profits (R. 42).[14]

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[12] An Air Force cost analysis branch was created to analyze cost breakdowns submitted by contractors with the branch's approval administratively required on all contracts for more than $25,000. If the branch questioned the fairness or reasonableness of a price, conferences were normally arranged with the contractor in an attempt to arrive at a mutually agreeable price. (R. 40-41.)

[13] Ten per cent on fixed price procurements was generally accepted and considered as the top allowable limit. In a few exceptional instances, because of very special circumstances, 12% profit was permitted. Since these allowances were generally based on estimated costs, the profits actually realized were subject to renegotiation during most of the war. (R. 41-42.)

[14] Navy Department procurement was similar to the Air Force's with the exception that the Navy generally considered 12% profit on estimated cost as the top limit and the profits

B. *Events leading up to orders here involved:* (1) *Section 9 order of War Department:* In November, 1942, petitioner refused to furnish the cost breakdown requested by the Air Forces in connection with a comparatively small contract, and referred to a general audit previously made of its 1941 Air Force contracts (R. 42-43). Since that audit showed (1) profits on individual items ranging from 42 to 808%, (2) net profit for 1941 of 2.8 million on about 5 million dollars of business done, and (3) an indicated profit on some of the items involved in the proposed procurement ranging from 140 to 275%, petitioner's officials were requested to come to Air Force Procurement Headquarters at Wright Field to discuss prices (R. 43). At the conference, petitioner refused to reduce its prices, claiming, *inter alia,* that since its products were patented, it could charge any price that the market would bear and further that since commercial purchasers had paid these prices over a long period of time, the prices it was charging were only established commercial prices (R. 43).[15] Despite the cost analysis branch's adverse recommendation, the procuring officials reluctantly purchased these items from petitioner at its list prices because it was the sole source of the items which were urgently needed to maintain mounts already

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it allowed ranged from 10 to 12%, likewise without regard to whether the items procured were produced under patents (R. 42).

[15] This position was subsequently elaborated upon in a long memorandum submitted by petitioner's president on December 28, 1942 (R. 43-44).

installed (R. 44). Thereafter, at various times throughout 1943, similar procurements, although likewise disapproved by the cost analysis branch, were necessarily made from petitioner by Air Force procurement officials (R. 44).

In January, 1944, after a conference with the Eastern Procurement District procurement officials,[16] at which it reiterated its consistent position on prices (see *supra,* pp. 7, 10), petitioner finally acceded and submitted a cost breakdown in connection with $650,000 worth of mounts and spare parts which the Air Forces needed (R. 45). Since the breakdown showed that petitioner proposed to make a 64% profit on one group of items and 39.8% on the other, the proposed procurement was disapproved (R. 45). Upon the refusal of petitioner's vice-president to accept a contract based on prices adjusted to reflect 10% profit, the matter was referred to Wright Field (R. 45). At a further conference at Wright Field on March 22, 1944, Air Forces officials, in order to secure urgently needed products available only from petitioner on a voluntary basis, offered, subject to the approval of the Secretary of War,[17] to pur-

[16] In 1943, Air Force procurement activities, relating to products such as petitioner's, were decentralized to the Eastern Procurement District of New York City, which, although it had the same experiences with petitioner, out of necessity continued to purchase petitioner's products at petitioner's prices (R. 45).

[17] The offer was conditioned on the approval of the Secretary of War because the 15% profit proffered exceeded the generally accepted 10% top limit profit which had been approved as fair and reasonable for this type of Air Force fixed price contract (R. 46). See *supra,* p. 9.

chase the products on the basis of petitioner's estimated costs, as disclosed in its cost breakdown, plus a 15% profit (R. 46). Petitioner, however, failed to give any answer within the requested period or even after further exchanges of wires (R. 46-47).

On May 19, 1944, an order dated May 6 (designated as "Compulsory Order No. W 33-038 ac-2753") of the Under Secretary of War, acting under Section 9, was sent to petitioner, requiring it to furnish specified quantities of 61 of its products [18] to the War Department (R. 51-53).[19] Petitioner thereafter submitted a "Price Analysis" of the items covered by the order, which showed, on petitioner's prices, a loss of 11% on one item and of .0036% on another, profits ranging up to 337% on the others, with an over-all profit of 43.84% on all 61 items (R. 56). Subsequently, petitioner, in formally acknowledging the order for the first time, enclosed its price schedule, with the comment that "We know of no other relevant data for the determination of appropriate prices, except these schedules * * *" (R. 57-58). Because

[18] The orders embraced the items as to which the Air Forces had unsuccessfully sought a basis for voluntary agreement since they had been unable to obtain quotations on these items from any other source (R. 52).

[19] The order stated that petitioner would be paid "fair and just compensation" and authorized it to submit "such data as in your opinion may be pertinent to the determination of such reasonable price" (R. 53). The letter of transmittal advised petitioner that if it so desired, negotiation to arrive at satisfactory prices with a view to superseding the order by a voluntary agreement would be permissible (R. 54).

of negotiations looking toward voluntary agreement as to prices, the War Department deferred fixing compensation under this order. These prices were fixed on October 24, 1944, on the same basis as the prices in the Title VIII repricing order (R. 81). See *infra,* pp. 16-17.

(2) *Navy Department Section 9 Order:* At or about the same time, the Navy required four items, on which petitioner among others had submitted bids (R. 47). The Navy preferred petitioner's products but inasmuch as petitioner's prices were substantially higher, the Navy sought through negotiation to have these prices reduced (R. 47). Upon the failure of these negotiations, the Navy, also acting under Section 9, on April 27, 1944, placed an order (designated "Compulsory Order No. 2") with petitioner for specified quantities of the four items in question (R. 47-49).[20] In response to petitioner's protest of May 3, which similarly enclosed its price schedules for the articles, with the comment: "We know of no other relevant data for the determination of appropriate prices" (R. 50) (*supra,* p. 12), the Acting Secretary of the Navy on May 16, stated "that, according to your own figures, your prices exceed your costs by 131%" (R. 51). On May 27, the Secretary of the Navy made his determination of reasonable prices, totalling $85,-

[20] The order was similar in text to that of the War Department. See fn. 19, p. 12, *supra.* Both orders are set out in full in the findings of the Court of Claims at R. 47-49, 51-53.

302.70, on the basis of a report, made by Navy representatives after examining petitioner's books, which showed that by allowing every cost item appearing on the books, including all administrative overhead, selling and patent expenses, petitioner would have made $113,067.10 profit on its originally quoted price of $189,840, a profit of 147% on cost (R. 54). The prices were fixed by the Secretary of the Navy to yield petitioner profits of 10% on the prices so fixed, and 11.1% on cost (R. 55).

(3) *Navy Contracts of June 29 and July 24, 1944:* On June 29, and July 24, 1944, respectively, the Navy entered into two contracts with petitioner for the furnishing of certain products (R. 58). Each contract contained a "Price Redetermination" provision, which, after stating that " 'the prices specified herein * * * are the prices quoted * * * by the Contractor,' " provided that the parties should negotiate for a redetermination of prices by mutual agreement and in the event of failure of these negotiations, the Secretary of the Navy could fix prices under Title VIII of the Revenue Act of 1943, and petitioner should have all remedies available thereunder (R. 58-59).

(4) *Title VIII Joint Repricing Order:* Meanwhile, on June 13, 1944, a meeting was held between representatives of petitioner and the Services to ascertain whether a voluntary agreement could be reached as to the items covered by the two orders under Section 9 and also to reexamine the entire

procurement relationship between petitioner and the Government, including both its prime and its subcontracts (R. 56). Despite renewal of the Army's offer to pay prices based on estimated costs plus 15% profit (see *supra,* pp. 11-12), no agreement was reached (R. 57). Further meetings and negotiations took place on July 13, July 20, and other times, at which the Services proposed an interim 32% discount on petitioner's list prices pending fixing of prices on a realistic cost basis (R. 59-63). Petitioner indicated that it would accept these terms in consideration of the "promise of the Services of their cooperation and assistance in providing a sound financial condition of the company and of the receipt of such relief" (R. 63). Subsequent negotiations revealed that petitioner was conditioning its acceptance not only on approval of outstanding applications for certificates of necessity under Section 124 of the Internal Revenue Code, permitting accelerated amortization for tax purposes, but also on freedom from statutory renegotiation (R. 63-64).[21] See *supra,* p. 6, fn. 13, p. 9; R. 41-42. The whole problem was further discussed at a large conference on August 29 and upon failure to agree, the Services finally concluded that they had no alternative but to commence formal proceedings under Title VIII for

[21] Although it was against petitioner's policy to avail itself of direct government financing, petitioner by May 1944 had applied for and received certificates of necessity under Section 124 of the Internal Revenue Code for its expanded emergency facilities in the amount of approximately $3,700,000 (R. 36).

the entire repricing of petitioner's products which were being supplied, directly and indirectly, to the Services (R. 64-65).

On August 30, 1944, the Services delivered to petitioner identical letters headed "Requirement to Negotiate Fair and Reasonable Prices," setting a time and place for meeting for that purpose (R. 65-66, 67).[22] Preparatory to the meeting, the Services conducted a joint examination of petitioner's books which disclosed that on the basis of its current costs, petitioner would make 73.36% profit on its unfilled military orders, as of June 30, 1944, of approximately $16,000,000, and that petitioner had made 73% profit on its 1943 business and 86.65% profit on its January and February, 1944 business (R. 67).[23] Since petitioner took basically the same position at this conference as it had taken at previous conferences,[24] the Services' representatives

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[22] The letters stated, *inter alia:*

> Negotiations with you with reference to the prices of the above-mentioned products have extended over a long period of time and you have refused voluntarily to agree to fair and reasonable prices therefor. The prices charged by you * * * have resulted and are continuing to result in your earning excessive profits from war contracts. [R. 66.]

[23] All of petitioner's costs, as shown by its books, directly or indirectly attributable to manufacturing items, were included in the computation, including all general overhead, administrative, and selling expenses as well as patent expenses. Questionable items were decided on bases most favorable to petitioner. (R. 67.)

[24] The only additional offer advanced by petitioner was the unworkable suggestion that petitioner would meet any of its competitors' prices provided certain factors were taken into consideration in comparing the competitors' prices with petitioner's prices, that is, petitioner would meet a competi-

concluded that petitioner was not negotiating in good faith and adjourned the meeting (R. 68-69). On September 23, the Secretaries of War and Navy, acting pursuant to Title VIII, jointly issued to petitioner "Army-Navy Joint Repricing Order No. 1."[25] This order which embraced 655 items—consisting of practically all of petitioner's principal products then being furnished to the War and Navy Departments "either directly under prime contracts with [the] Departments or indirectly under subcontracts" (R. 69-72)[26]—was to be effective from October 2, 1944, to March 31, 1945 (R. 71), and fixed prices for these items on the basis of the Army-Navy audit of petitioner's costs,[27] to which was added a profit of 10% on costs (R. 72).[28]

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tor's prices provided quantities of orders were the same, the quality was the same, the delivery dates were identical, and the relative amounts of governmental financial assistance were comparable (R. 68-69).

[25] Copies of the order were sent petitioner's customers advising them of the new prices applicable to petitioner's products covered by the Order (R. 72).

[26] The order specifically provided that it did not apply to the Section 9 orders previously issued (R. 72). See *supra*, pp. 10-14.

[27] After the Order became effective, the Services established at petitioner's plant a "cost inspection office" to discover such cost changes as might occur from time to time as would warrant amending the Order, as well as to receive such suggestions as petitioner might have to offer for amendments, based either upon alleged mistakes in the Order or upon changed cost conditions. However, no such suggestions were ever received by the "cost inspection office". (R. 72.)

[28] The amount of profit allowed was more than would ordinarily have been allowed under the Services' pricing practice (*supra*, p. 9), especially since a substantial portion of petitioner's work was being performed by sub-contractors,

In addition to protesting the Order in identical letters dated September 30, 1944, to the Secretaries of War and Navy (R. 72-73),[29] petitioner, in an attempt to force the Services "to rescind the repricing order, or at least to have it modified" (R. 74), notified its customers that effective with the Repricing Order, they would have to pay cash in advance for the entire amount of any orders for items covered by the Repricing Order, that shipments on pending orders would have to be paid for on a C. O. D. basis, and that its customary terms of allowing discounts for payments within specified times was abandoned, with the new terms "net cash (no cash discount)" (R. 75-76).[30] The adoption of this policy brought a large number of complaints and protests; some customers, because of need for petitioner's products, complied, but others refused to deal with petitioner with the result that deliveries fell sharply during October (R. 77). The Services wired petitioner several times informing it that this new pol-

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but in the circumstances and in the interest of fairness, the Services decided to allow the highest profit margin which the War Department was allowing to contractors on such fixed-price production contracts (R. 69).

[29] Petitioner protested on the grounds, *inter alia*, that "no effort has as yet been made by the Services to negotiate with the Lord Company" as required by statute and that the order "gives no consideration to * * * the fact that the Lord products are covered and protected by patents and the fact that the user of Lord products incurs no liability for the infringement or use of patents" (R. 73).

[30] This new policy was not to apply to orders or items not covered by the Repricing Order or to civilian business, as to which the former practices were continued (R. 76).

icy violated the Repricing Order[31] and was interfering with vitally needed war production (R. 77-81). Upon petitioner's failure to revert to its former terms of sales, the Secretary of the Navy, on October 25, 1944, acting pursuant to Executive Order No. 9493 (9 F.R. 12860) specifically authorizing and directing such action, seized and thereafter operated petitioner's plant (R. 81).[32]

For all the items supplied by petitioner under the orders and contracts here involved, petitioner was paid, at the prices fixed by the Services, the sum of $979,050.10 (R. 87). Since it cost petitioner $885,954.89 to produce these items, petitioner actually realized a profit thereon of $93,905.21, a profit of 10.5% on cost (R. 87).[33] At petitioner's list prices, which it seeks to establish here as the measure of compensation, petitioner would have received $1,491,584.19, and since $605,629.30 of that would have been profit, it would have realized 68.3% profit on cost (R. 87). The difference between the $605,629.30 profit it would have

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[31] The Repricing Order provided:

> * * * No change shall be made in Lord Manufacturing Company's existing usual terms and conditions of sale with respect to deliveries subject to this order that shall have the effect of increasing the return to Lord Manufacturing Company provided by such prices under such terms and conditions [R. 70-71].

[32] Petitioner's separate suit to recover compensation for the Government seizure and operation of its plant is pending in the Court of Claims. *Lord Mfg. Co.* v. *United States*, C. Cls. No. 47000.

[33] The profit actually received was slightly higher than that estimated since petitioner's actual costs were somewhat below those estimated.

received under its list prices and the $93,095.21 profit received under the Services' determination is $512,534.09, the amount which petitioner seeks to recover in these proceedings. See *supra*, p. 3.

ARGUMENT

This proceeding is one of several brought against the Government by petitioner, the dominant producer of desperately needed aircraft mountings, as a result of petitioner's persistent refusals, at the height of the war, to accept for its mountings anything less than its commercial list prices, which were set at "what the traffic will bear" and which netted petitioner fantastic profits, in some instances in excess of 300% on costs.[34] This case marks one of the very few instances where the Services invoked their authority under Section 9 of the Selective Training and Service Act of 1940, and Title VIII of the Revenue Act of 1943. The Services exercised that authority here very reluctantly, and only after long-drawn out efforts to obtain voluntary price reductions from petitioner convinced them that petitioner was intent on full exploitation of its patents and near-monopoly position.

In this case, petitioner is seeking to obtain judicial approval of its list prices as the measure of

[34] In addition to the instant case, the three renegotiation proceedings pending in the Tax Court (*supra*, fn. 7, p. 6), the suit for the seizure of its plant (*supra*, fn. 32, p. 19), there are two suits for infringement of petitioner's patents brought under the Act of June 25, 1910, as amended (35 U. S. C. 68). *Lord Mfg. Co.* v. *United States*, C. Cls. Nos. 47714, 47715.

compensation for the mountings furnished under the Section 9 and Title VIII orders. Petitioner assumes that these orders involved a Fifth Amendment taking of its property and accordingly urges that it is entitled to the just compensation prescribed by that Amendment. Arguing from this premise, petitioner contends that its established list prices constituted the market value of its products, and hence should have been accepted by the Court of Claims as the measure of its compensation, apparently without reference to the tremendous profits it would obtain thereunder. This position, we submit, is patently unsound and raises no questions warranting review by this Court.

1. Contrary to petitioner's flat statement (Pet. 3), the Court of Claims did not hold that the Services' actions resulted in a Fifth Amendment taking. On the contrary, the court below merely stated that "we are inclined to the opinion that there was a taking of [petitioner's] property" (R. 98) and went on to comment, "However, in the circumstances of this case, we do not think it particularly important whether it be construed as a strongly worded order with which [petitioner] reluctantly complied, or whether it be construed as a taking of private property. The net results as we see them are practically the same." (R. 98.) It was the court's position that—regardless of whether or not there was a taking here, and whether or not the "just and fair" compensation

prescribed by Section 9 and Title VIII may, in non-taking cases, be less than the Fifth Amendment's standard—the full measure of the constitutional requirement was satisfied by the administrative awards in this case. This holding we believe to be unassailable.[35]

The decisive test in "just compensation" cases was recently stated by the Court:—"Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill? The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' . . ." *United States* v. *Commodities Trading Corp.*, Nos. 156, 163, this Term (decided March 27, 1950), slip opinion, p. 2. As summarized last Term in *United States* v. *Cors*, 337 U. S. 325, 332:

> The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does

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[35] If there was no taking, the just compensation clause of the Fifth Amendment is, of course, irrelevant, except insofar as its standard may be incorporated in Section 9 and Title VIII.

We think it easily demonstrable, if the issue becomes pertinent, that at least the Navy contracts of June 29 and July 24, 1944 (*supra*, p. 14) and the joint repricing order (*supra*, pp. 14-18) issued under Title VIII (*infra*, pp. 33-35) did not involve a taking. Cf. *Lichter* v. *United States*, 334 U. S. 742, 745, fn. 1, 787, 788.

> not contain any definite standards of fairness by which the measure of "just compensation" is to be determined * * *. The Court in an endeavor to find working rules that will do substantial justice had adopted practical standards, including that of market value.

See, also, *United States* v. *Toronto Nav. Co.,* 338 U. S. 396, 402; *United States* v. *Felin & Co.,* 334 U. S. 624, 641; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 279-280; *United States* v. *Miller,* 317 U. S. 369, 373, 374-375.

It follows from these principles that even if petitioner's commercial list prices could properly be characterized as evidencing a "market value" of a sort,[36] they should not be used as the measure of its just compensation. When the application of market value "would result in manifest injustice to owner or public, courts have fashioned and applied other standards." *United States* v. *Commodities Trading Corp.,* Nos. 156, 163, this Term, decided March 27, 1950, slip op., p. 2. Cf. *United States* v. *Miller,* 317 U. S. 369; *Olson* v. *United States,* 292 U. S. 246; *United States* v. *Cors,* 337 U. S. 325. Petitioner's list prices did not reflect the type of market value which sometimes is used as the meas-

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[36] It is difficult to see how the list prices can be equated with market value just because petitioner insisted on selling at those prices and its customers purchased at those prices because they could not help themselves. Market value connotes a number of sellers and buyers, and other manufacturers of these products, who were relatively new in the field, were selling at prices below those set by petitioner. *Supra,* p. 8; fn. 37, *infra,* p. 24; R. 82-5.

ure of just compensation, *i.e.*, the price which "a willing buyer would pay in cash to a willing seller." *United States* v. *Miller*, 317 U. S. 369, 374. On the contrary, petitioner's prices were those of a near-monopolist and were set not on the basis of any fixed formula or percentage of profit but as the Court of Claims found (R. 38), at "what the traffic would bear." Before the war, petitioner had a virtual monopoly of the aircraft mounting field; it occupied "a dominant place in that field with little or no real competition" (R. 34-35). Although some competition did appear during the war, petitioner resisted it strenuously by threatening suits for patent infringement (R. 39). Despite the competition, which nevertheless did secure a foothold,[37] petitioner, who remained the sole concern producing a full line and the only source of supply of many items, continued to supply about 60% of all aircraft mounts (R. 37-38, 39).

The aircraft industry and the Government did not pay petitioner's prices willingly; they paid these prices because they desperately needed products such as petitioner's which, in many instances, were produced only by petitioner. The findings of the court below detail the numerous efforts made to obtain voluntary price reductions from petitioner and the reluctance of the Government and

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[37] Although the competitive prices were higher initially than petitioner's, they were generally lower in 1944 as the competitors acquired experience and their volume increased (R. 39).

the industry to purchase from petitioner, but the needs of the situation were so imperative that there frequently was no alternative but to buy petitioner's mountings at petitioner's prices. Coupled with this great need was petitioner's strategic patent position, to which the Court of Claims rightly referred in its discussion of the character of the "market" and the "market value" claimed to be present in this case (R. 100). As summarized by the court below, "because of the conditions under which these mounts were produced and sold by [petitioner], both prior to and during the war period, the prices charged therefor by [petitioner] were not fixed in a real competitive market" (R. 39).[38]

Moreover, it would have been unfair to virtually all other manufacturers as well as the public to accept list prices returning such fantastic profits to petitioner as the measure of just compensation. As pointed out by the court below (R. 101):

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[38] There is no substance to petitioner's contention advanced both in the negotiations with the Services (R. 43, 44, 73) and in the court below, as well as inferentially suggested here (Pet. 20, 21), to the effect that the patents embodied in its products entitled it to its full list prices. Apart from the fact that practically no other contractor claimed entitlement to higher profits by reason thereof (R. 42), it is clear that the Act of June 25, 1910, as amended (35 U. S. C. 68), and the Royalty Adjustment Act (Act of October 31, 1942, 56 Stat. 1013, 35 U. S. C. 89-96), were enacted for the express purpose of making such patented products available directly or indirectly to the Government at fair and just costs. Cf. *Crozier* v. *Krupp*, 224 U. S. 290; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331; *Coffman* v. *Federal Laboratories, Inc.*, 171 F. 2d 94 (C. A. 3), certiorari denied, 336 U. S. 913.

> The nation was in great peril—our national life being at stake. People were necessarily attuned to the war effort. Men and women were uncomplainingly permitting themselves to be drafted for all kinds of difficult war jobs. Women and even children were driving tractors in the hot sun to produce and supply the food essential to the world-wide operations of our army and navy and those of our allies. Young men, who had never had a fling at life, were taken from their homes to face hardship and even death on distant fields. Businessmen generally and even plaintiff's competitors were willingly accepting the 10 percent above cost for supplies and equipment needed in the war effort. Every effort was made to mobilize manpower and materials. At such time it is unthinkable that a man would insist on profits of 50 to 100 percent; and it is inconceivable that any court would allow any such profits as just compensation. It is true that plaintiff produced an article of quality. That is to its credit. It is also natural that those who had the responsibility of procuring the equipment for those who were to fight in the air should want the best. But the doctrine that prices may be based on what the traffic will bear has no place in our national economy at such a time.

In these circumstances, the court below was plainly justified in rejecting petitioner's list prices —whether they evidenced the then market value, or not—in favor of cost plus a reasonable profit as the measure of compensation to which petitioner

was entitled. See, *e.g., United States* v. *Commodities Trading Corp.*, Nos. 156, 163, this Term (decided March 27, 1950), slip op., 2 [39]; *United States* v. *Cors*, 337 U. S. 325, 333-334; *United States* v. *Toronto Nav. Co.*, 338 U. S. 396; *Highland* v. *Russell Car Co.*, 279 U. S. 253; see also the discussion before the Advisory Board on Just Compensation on "calamity" and "hold-up" values set out in the dissenting opinion in *United States* v. *Cors*, 337 U. S. 325, 341, fn. 3, and in the Brief for the United States in the *Commodities Trading Co.* case, *supra*, at pp. 64-66.[40]

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[39] In *Eastern Machinery Company* v. *Under Secretary of War*, C. A. D. C. No. 10309 (decided April 10, 1950), the Court of Appeals for the District of Columbia Circuit, in an opinion written by Judge Fahy, rejected a contractor's claim that the profits left him as the result of statutory renegotiation were too small, with the comment (slip op., p. 3):

> "There is no constitutional guarantee of more than a small profit in war work. See *Yakus* v. *United States*, 321 U. S. 414, 431 (1943); *Bowles* v. *Willingham*, 321 U. S. 503, 519 (1943). We believe that this view is also supported by the recent decision in *United States* v. *Commodities Trading Corp., supra.*"

[40] As for petitioner's contention that it should have received its list prices because they allegedly constituted the O.P.A. ceiling prices (Pet. 13-14), it should be noted, *first*, that neither the record before the court below nor the record in this Court contains sufficient evidence indicating what were the ceiling prices, if any, applicable to petitioner's products sold for military use, and that the Court of Claims made no finding on the point; *secondly*, that the claimed ceiling resulted from a price regulation which merely fixed the maximum at whatever price happened to be charged by the particular vendor in January 1942 (Pet. 8, fn. 6) and did not establish a single ceiling applicable to all vendors in like circumstances; and, *thirdly*, that in the *Commodities Trading Co.* decision, *supra*, the Court held only that the O.P.A. ceiling should normally be accepted as the "*maximum* measure of compensation" (slip op., p. 7; italics supplied), and not that

2. The Services' determination as to compensation, which the Court of Claims approved and which was fixed so as to return to petitioner all of its costs plus abundant profits considering the tremendous volume of business involved, plainly met the fair and reasonable compensation requirements of Section 9 and Title VIII as well as of the Fifth Amendment. As to costs, all costs shown by petitioner's books, directly or indirectly attributable to manufacturing items, were allowed, including all general overhead, administrative and selling expenses, with all questionable items decided on bases most favorable to petitioner (R. 54, 67, 72). This allowance of costs was generous, since the determination of *reasonable* costs would here be a prerequisite to the fixing of fair compensation. It is clear that in so determining costs at least the salaries paid by petitioner's officers to themselves (see chart, *supra,* fn. 8, pp. 6-7) could properly have been reduced.

The 10% profit allowed was likewise more than generous. "In the interest of fairness," petitioner's profits were fixed so as to yield "the highest profit margin which the War Department was allowing to contractors" on the type of production here involved (R. 69). This profit figure "was more than would ordinarily have been allowed" (R. 69) under the Services' pricing systems which

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it established the minimum or usual award. In that case, the Government did not contend for any figure less than the ceiling price.

were almost unanimously endorsed by the country's manufacturers who dealt with the Services (R. 41-42). Indeed, during World War II, Congress frequently limited the fees on cost-plus-fixed-fee contracts to 6 or 7% of the estimated cost. See, *e.g.*, 54 Stat. 872, 873 (Army contracts for military posts, fee not to exceed 6% of the "estimated cost" of the contract); 56 Stat. 176, 178 (Army and Navy vessel, aircraft and other contracts, 7%)); and Executive Order 9001, dated December 27, 1941 (6 F. R. 6787), promulgated under the First War Powers Act (50 U. S. C. App. 601), providing that in the absence of other profit limitations by applicable statutes, the fixed fee under any cost-plus-fixed-fee contract executed under the Act should be limited to 7 per cent of the estimated cost.

The liberality of this determination is further manifest when projected for petitioner's production of the entire year, translated into terms of dollars as applied to its total volume, and compared with its comparatively small profits during the typical pre-war years. It cost petitioner over $20,000,000 to turn out its 1944 volume.[41] Prices yielding 10% profit on such costs, if they had been in effect for the entire year, would thus have returned profits of approximately $2,000,000 a year.

[41] For the first ten months of 1944—a period largely unaffected by the orders involved here—petitioner's sales were approximately $28,000,000, and its profits were approximately $10,000,000 (see R. 35), leaving costs of approximately $18,000,000, or approximately $1,800,000 per month. Over a 12-month period, its costs would therefore have totaled approximately $21,000,000.

This would certainly be a handsome return for a company such as petitioner which, in the pre-war years 1936-1939, realized profits averaging only $62,000 a year.

CONCLUSION

The holding of the court below is clearly correct. There is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

1. Section 9 of the Selective Training and Service Act of 1940 (Act of September 16, 1940, c. 720, 54 Stat. 885, 892, 50 U. S. C. App. 309) provides in pertinent part:

> The President is empowered, through the head of the War Department or the Navy Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.
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> Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army or Navy, and any individual, firm, association, company, corporation, or organized manufacturing industry or

the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War or the Secretary of the Navy shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War or the Secretary of the Navy, or who shall refuse to furnish such arms, ammunition, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War or the Secretary of the Navy, as the case may be, then, and in either such case, the President, through the head of the War or Navy Departments of the Government, in addition to the present authorized methods of purchase or procurement, is hereby authorized to take immediate possession of any such plant or plants, and through the appropriate branch, bureau, or department of the Army or Navy to manufacture therein such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for

not more than three years and a fine not exceeding $50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just: *Provided,* That nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security, and employment standards of the employees in such plant.

2. Title VIII of the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VIII, 58 Stat. 21, 92, 50 U. S. C. App. 1192) provides in pertinent part:

TITLE VIII—REPRICING OF WAR CONTRACTS

SEC. 801. REPRICING OF WAR CONTRACTS.

(a) As used in this section the terms "Department", "Secretary" and "article" shall have the same meanings as in subsection (a) of the Renegotiation Act.

(b) When the Secretary of a Department deems that the price of any article or service of any kind, which is required by his Department or directly or indirectly required, furnished, or offered in connection with, or as a part of, the performance or procurement of any contract with his Department or of any subcontract thereunder, is unreasonable or unfair, the Secretary may require the person furnishing or offering to furnish such article

or service to negotiate to fix a fair and reasonable price therefor. If such person refuses to agree to a price for such article or service which the Secretary considers fair and reasonable, the Secretary by order may fix the price payable to such person for furnishing such article or service after the effective date of the order, whether under existing agreements or otherwise. The order may prescribe the period during which the price so fixed shall be effective and such other terms and conditions as the Secretary deems appropriate.

(c) Any person aggrieved by an order fixing a price under this section may sue the United States in any appropriate court. In such suit, such person shall be entitled to recover from the United States the amount of any difference between (1) fair and just compensation for the articles and services furnished under the terms of the order and (2) the price fixed for such articles and services by the order; but if the prices so fixed by the order are found to exceed fair and just compensation for such articles and services, such person shall be liable to the United States in such suit for the amount of this excess. Any such suit shall be brought within six months after the order by the Secretary on which it is based, or after the expiration of the period or periods specified in such order, whichever last occurs. Such a suit shall not stay the order involved.

(d) Whenever any person wilfully refuses, or wilfully fails to furnish any such articles or services at the price fixed by an order of the

Secretary in accordance with this section, the President shall have power to take immediate possession of the plant or plants of such person and to operate them in accordance with section 9 of the Selective Training and Service Act of 1940, as amended.

(e) The authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(f) Every purchase order or agreement, or contract to make or furnish any article or service of any kind, which is required by a Department or directly or indirectly required, furnished, or offered in connection with, or as a part of, the performance or procurement of any contract with such Department or of any subcontract thereunder, shall, if made thirty days or more after the date of the enactment of this Act, be deemed to contain a provision under which the person making or furnishing such article or service agrees that notwithstanding other provisions of the purchase order, agreement, or contract, he shall be entitled to receive for such article or service only the fair and just compensation provided for in subsection (c).

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